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No. 91-241

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1991

JOSEPH P. DIIORIO,

Petitioner,

vs.

GIBSON & CUSHMAN DREDGING CORP.,

Respondent,

GIBSON & CUSHMAN OF NEW YORK, INC.,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

This brief is submitted in reply to the opposing brief of the Respondent. The facts have been fully developed in the petition and in the opposing briefs and need not be repeated. We shall, therefore, proceed directly to a discussion of the law.

POINT I

THIS IS A MARITIME CASE. PREJUDGMENT INTEREST SHOULD THEREFORE BE AWARDED.

Respondent argues that this is not a maritime case. Therefore, says respondent, this court lacks jurisdiction. Of course, this approach, if valid, allows respondent to sidestep the issue of prejudgment interest. In fact, respondent has done just that.

The contention that this is not a maritime case is manifestly absurd. Indeed, the Appellate Division of the New York State Supreme Court for the First Department, stated, in this case:

> "As the question of prejudgment interest was not presented to the jury *in this maritime personal injury action* *** (emphasis supplied)."

Of course, this determination by the Appellate Division that it was, indeed, dealing with a maritime personal injury action is in line with settled authority. It is undisputed that petitioner, a wiper aboard the dredge PITTSBURGH, sustained massive personal injuries when that vessel's steam turbine exploded. The PITTSBURGH was then engaged in a United States Army Corps of Engineers Dredging Project in the Cape Fear River, North Carolina. It is equally undisputed that the Cape Fear River, at that point, is a navigable waterway.

Where the situs of an injury is in a vessel on navigable waters, whether the vessel is docked or underway, maritime law applies. In maritime cases, the award of prejudgment interest is the rule rather than the exception. *Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1042-43 (5th Cir. 1983); *Webster v. M/V Moolchand,* 730 F. 2d 1035, 1040 (5th Cir. 1984); *Barnett v. SeaLand Services,* 875 F. 2d 741, 746-747 (9th Cir. 1989) and *Taliercio v. Cia. Empresa S.A.*, 761 F. 2d 126, 129 (2d Cir. 1985).

The respondent is apparently confused by the fact that the Trial Court submitted the case to the jury as a land-based common-law negligence case, rather than as a maritime personal injury case. That was done over petitioner's objection and cannot change the character of the case. At no time did petitioner acquiesce in the Trial

Court's erroneous submission of the case to the jury as a land-based negligence case.

As we pointed out in the petition herein, while the weight of authority in the lower federal courts is in favor of awarding prejudgment interest in maritime personal injury cases, there is a conflict. Some courts have held to the contrary.

This is an important issue. The lower federal courts, and the state courts which have concurrent jurisdiction in these cases, are understandably confused on this issue. It is, therefore, respectfully submitted that the writ should issue to resolve this question.

POINT II

THERE WAS NO WAIVER.

The fact that the question of prejudgment interest was not presented to the jury is meaningless. The Appellate Division misconstrued *Havis v. Petroleum Helicopters Inc.*, 664 F.2d 54 (5th Cir. 1981). In that case, the Court awarded prejudgment interest, at the rate prescribed by the state having the most contact with the case, despite the fact that the matter of interest had not been submitted to the jury. A later case in the same circuit, *Morales v. Garijak Inc.*, 829 F. 2d 1355 (1987), somehow came to the conclusion that *Havis, supra,* held that if the issue of interest had not been submitted to the jury, it could not be awarded.

Relying primarily on *Morales,* the Appellate Division held, in *Pires v. Frota Oceanica Brasileira, S.A.*, 554 NYS 2d 855, 857 (1990) that the issue of prejudgment interest must be submitted to the jury. That holding is, of course,

plainly contrary to law. In fact, in a very recent decision, *Escobar v. Seatrain Lines, Inc.*, New York Law Journal, August 26, 1991, copy of which is annexed hereto, the Appellate Division impliedly abandoned the position it had taken in the instant case and in *Pires, supra,* and squarely held that where the injury occurs on a vessel in navigable waters, the award of prejudgment interest is the rule rather than the exception. In that case, the issue of prejudgment interest had never been submitted to the jury. Obviously, it is a pure question of law, to be decided by the Court.

"Waiver" is generally defined as the voluntary and intentional relinquishment of a known right. See 28 Am. Jur. 2d, "Estoppel and Waiver," Sec. 154. The fact that petitioner did not seek prejudgment interest in connection with the earlier judgment, which was modified by the Appellate Division to reduce the award for future earnings (151 AD 2d 402) cannot, as a matter of law, operate as a waiver of petitioner's right to prejudgment interest.

The Trial Court and Appellate Court had persistently rejected petitioner's argument that this was a maritime law case. (9a, 10a, 39a, 42a, 44a, 49a, 58a) and that state procedural statutes, including the General Obligations Law 15-108 (10a, 11a, 20a, 49a) and state interest statutes (29a, 39a, 44a, 49a, 54a, 55a, 57a, 58a) did not apply.

Until the Appellate Division belatedly remodified its June 27, 1989 Order (22a-25a) by expressly ruling as a matter of fact and law that this was a maritime personal injury action, petitioner could not argue before this Court that petitioner was entitled to maritime pre-judgment interest on the verdict and that the state General Obligations law did not apply because it conflicted with maritime law. The June 27, 1989 Order applied land based tort law. The Appellate Division's November 20, 1990 Order (61a-62a)

was subsequent to the U.S. Supreme Court's denial of petitioner's application for a stay on September 29, 1989 (31a). All the Trial Court and Appellate Court orders prior to November 20, 1990 no longer constitute "law of the case" on the factual and legal question of whether maritime law applies.

Respondent's argument to invoke Waiver (or laches), alleging it is prejudiced by petitioner's alleged 13 year failure to ask for pre-judgment interest (Brief in Opposition, p7), is facetious. There is no pleading requirement for maritime pre-judgment interest, and a demand for same prior to any award is premature.

There was no surprise to respondent, engaged in the maritime business of dredging navigable waters for approximately fifty years, that petitioner DiIorio, an oiler on their dredge (Respondent Opposition Brief p. 2), and a Jones Act seaman, would argue maritime law applied to him, with all its consequent rights and protections.

The omission on that earlier occasion, to add prejudgment interest could not possibly have prejudiced the respondent in any way. Moreover, at that time, the trial court's insistence on treating this as a land-based negligence case precluded counsel from requesting prejudgment interest. A reading of the colloquy between counsel and Justice Gammerman on January 13, 1988 (4a et seq.) will demonstrate that, in any event, it would have been futile, at that time, for petitioner to have even mentioned prejudgment interest. As can be seen, from a reading of the colloquy, Justice Gammerman persisted in his mistaken view that this was a land-based negligence case and not a case of maritime personal injury. That being the case, for Counsel to have persisted would simply have been pointless.

The following is stated in 28 Am. Jur. 2d "Estoppel and Waiver," Sec 158:

> "Waiver is mainly or essentially a matter of intention. *** Mere negligence, oversight or thoughtlessness does not establish a waiver."

It is not the purpose of the law to penalize a litigant for an inadvertent error, nor is it the law's purpose to perpetuate error. Thus, the fact that petitioner's attorney did not seek prejudgment interest on the earlier occasion is meaningless and should be treated accordingly.

POINT III

MAINTENANCE AND CURE CANNOT BE DEDUCTED PURSUANT TO A STATE PROCEDURAL STATUTE IN A SEAMAN'S FEDERAL MARITIME LAW CASE FOR PERSONAL INJURY DAMAGES.

Respondent recognized that maintenance and cure, payable only by the shipowner, is money sufficient to provide a seaman with food, lodging and necessary medical expenses (Respondent's Brief, p. 8).

Petitioner incurred enormous hospital and medical expenses due to the severity of his injuries. Petitioner's maintenance and cure settlement of $600,000 against the shipowner paid for these special damages.

Petitioner's maritime personal injury action against respondent for damages awarded petitioner past and future wage losses and pain and suffering (Petitioner's Appendix, 3a). Petitioner seaman did not seek a "double recovery" award of special damages to again pay for his

hospital and medical bills because the maintenance and cure settlement against his employer paid for the "special damages." The trial court, Justice Gammerman, recognized this and did not include a "question for the jury" to award special damages for medical expenses which is routine in all personal injury cases.

The subsequent November 20, 1990 Appellate Division order, ruling this is a maritime personal injury case, requires that no state procedural statutes, including N.Y. G.O.L. Sec. 15-108, defeat seaman DiIorio's substantive maritime rights.

Justice Gammerman's $600,000 deduction pursuant to N.Y. G.O.L. Sec. 15-108 violates that precept. *Lerner v. Karageorgis Lines, Inc.*, 66 NY 2d 479 (1985).

CONCLUSION

THE WRIT OF CERTIORARI SHOULD ISSUE

Respectfully submitted,

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Dated: New York, NY
September 20, 1991

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Mrs. Nery Escobar, individually and on behalf of two infants, Sergio Escobar, Jr., and Gilda Morejon as next of kin of Sergio E. Escobar, deceased,

Plaintiff-Respondent,

against

Seatrain Lines, Inc.,

Defendant-Appellant.

Judgment, Supreme Court, New York County (Edward Greenfield, J.), entered March 29, 1990, after a jury trial, in favor of plaintiff in the amount of $8,436,798.25, including interest and costs, unanimously reversed, on the law and on the facts, and a new trial before a different justice is ordered on the issue of damages, without costs. Appeals from the orders entered on or about July 18, 1986, April 27, 1988, February 28, 1990 and March 27, 1990, are dismissed as subsumed in the judgment without costs. Motion No. 2291/1991 to strike a portion of plaintiff's brief is unanimously denied.

This action arises from the death of a longshoreman engaged in maritime employment on board a vessel, on navigable waters, and so is governed by the Longshore and Harborworkers' Compensation Act, 33 USC §901 *et seq.* (the Longshore Act) and Federal maritime law *(Tibak v. City of N.Y.*, 154 AD2d 313, app. den. 75 NY2d 705; *Stuto v. Coastal Dry Dock & Repair Corp.*, 153 AD2d 937, lv. to app. dism., 75 NY2d 865). After a trial held in 1986, a jury found defendant liable, awarded damages of $869,000, but found decedent 70% negligent, resulting in an award of $260,700.

On January 26, 1989, we affirmed without opinion the trial court's order dismissing defendant's contributory negligence defense and setting aside the verdict as inadequate, and ordered a new trial on damages only (146 AD2d 973). Upon re-trial in May 1989 a jury awarded plaintiff $600,000 for past pecuniary loss, $2,400,000 for future pecuniary loss (which included $500,000 lost Social Security benefits), $2,000,000 for loss of society, and $250,000 to each of the decedent's two children for loss of nurture and care, which was reduced to $75,000 each by the trial court (566 NYS2d 813). For reasons that follow, we are constrained to reverse the judgment entered in the amount of $5,150,000 plus interest of $3,285,953.25, plus costs and disbursements of $845, for a total of $8,436,798.25, and order a new trial on damages.

Ordinarily, establishing a decedent's future earnings, had he lived, is based upon the decedent's actual earnings history. Here, however, plaintiff was apparently discouraged by what the decedent's earning history would have yielded because the decedent, aged 47 at the time of his death in 1977, had never earned more than $26,588 in any one year, and in the five years preceding his death had earned $17,930 in average yearly salary. The trial court permitted plaintiff to equate decedent's earnings to those of one Juan Fernandez, who was not only qualified as an ordinary longshoreman, or "hold man" (as was the decedent), but also a straddle carrier and crane operator, and who had average yearly earnings of $38,981 in the four years after 1977. In the contract year closest to decedent's death, Fernandez had earned $41,311, which is 55% more than decedent's highest annual salary of $26,588. This fatally tainted the jury's verdict which awarded $600,000 in lost wages from February 1977 through May 1989 (averaging $48,980 annually), and $1,900,000 from May 1989 to decedent's projected retirement at 70 years of age (averaging $172,727 annually).

The award was grossly excessive, and was apparently accomplished through the testimony of plaintiff's economic expert, Dr. Edmund Mantell. (Plaintiff also read excerpts from the testimony of the late Eugene Spector, plaintiff's other economist at the first trial.) We observe that Dr. Mantell's testimony as an expert witness was cited by the Second Circuit Court of Appeals, which held, in reversing a judgment for pecuniary loss of a decedent's wife and children, that "[t]he most prejudicial of [the errors occurring in the course of the trial] was allowing the jury to consider as evidence Dr. Mantell's lengthy, extravagant, and non-probative projections of Dr. Lin's future income." *(Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F2d 45, 49 [1984]. Just nine months before that, the Second Circuit found Dr. Mantell's proposed testimony to be "highly suspect" and "riddled with errors," and affirmed the determination of the District Court to exclude his testimony after it had noted "a number of assumptions and assertions made by Dr. Mantell that were so unrealistic and contradictory as to suggest bad faith." *(Shatkin v. McDonnell Douglas Corp.*, 727 F2d 202, 208 [1984]).

In the case now before us, Dr. Mantell projected that decedent would earn an average of $56,111 per year through 1989, and $145,686 per year until the year 2005 when decedent would have been 75 years of age. Dr. Mantell's testimony was improperly founded upon comparison of the earnings and work history of Mr. Fernandez, whose qualification and earning history were substantially different from the decedent's. Dr. Mantell's $4,016,400 projection of decedent's survivors' total economic loss was in our view highly speculative, and denied the defendant a fair trial.

If we were not reversing on the grounds of Dr. Mantell's testimony, we would nevertheless have reversed on the basis of plaintiff's counsel's personal attacks on the

defendant's trial attorney, and prejudicial appeals to the jury's passion and sympathy through the introduction of irrelevant evidence *(see, Berkowitz v. Marriott Corp.*, 163 AD2d 52). Several examples from plaintiff's attorney's summation are illustrative of the type of prejudicial statements made by plaintiff's counsel that warrant reversal in this case:

> Forget [defense counsel], forget his face. [Counsel] is only a facade, that behind that facade is the real Seatrain, the real Seatrain, the one that killed Sergio Escobar, and the one who has done everything you've heard of from the witnesses in this courtroom for many years. That's the real Seatrain.
>
> I want you to put aside that nice, friendly, affable gentleman because that's not the contest. The decision is is Seatrain responsible and for how much. So forget the Madison Avenue seller.
>
> Now, for example, in the orient they have professional criers, professional mourners that come to every funeral and cry and apologize and feel sorry. [Counsel] is a professional mourner here that was sent here by Seatrain so you will forget the real face of Seatrain. The real face of the company that did this. [Counsel] is the facade.
>
> Now, the purpose of his nice, friendly, gentle affable presence is to make you forget. I want you to remember. I also want you to remember that he wouldn't allow any of us to tell you how Sergio died.

* * *

> [Counsel] is the master of the half-truth, the inuendo [sic], what might be, what may be, what possibly could be, everything that's intended to raise the specter of doubt in your mind as to the realities that they killed him and its their obligation to pay.

After addressing similar conduct, the Appellate Division, Fourth Department stated, in words particularly applicable to counsel's conduct herein: "It is time that the bar should realize that when counsel in a close case resort to such practices to win a verdict, they imperil the very verdict which they thus seek. [citations omitted] The misconduct was repeated. It cannot be deemed inadvertent or harmless." *(Cherry Creek Nat. Bank v. Fidelity & Cas. Co. of N.Y.*, 207 App. Div. 787, 791; *see, also, Adams v. Acker*, 57 AD2d 741, 742, on reh. 58 AD2d 754, apps. dism. 42 NY2d 965 and 42 NY2d 1050). "When misconduct of counsel in interrogation or summation so violates the rights of the other party to the litigation that extraneous matter beyond the proper scope of the trial may have substantially influenced or been determinative of the outcome, such breaches of the rules will not be condoned." *(Kohlmann v. City of N.Y.*, 8 AD2d 598).

In addition to the attacks on defense counsel, and improper references to matters dealing with liability, which issue was not before that court, plaintiff's counsel also introduced into evidence extensive prejudicial testimony with respect to mourning, grief and psychiatric problems experienced by decedent's widow and daughter, which may have been responsible for the inflated award of $2,000,000 for loss of society. In *Sea-land Services v. Gaudet*, (414 US 573, 585), the Supreme Court held that although the widow and defendants of a deceased longshoreman are entitled to recover for loss of support, services (including nurture, training, education and guidance) and society, "[l]oss of society must not be confused with mental anguish or grief, which is not compen-

sable under the maritime wrongful-death remedy." (*id.* fn. 17).

Were we not reversing and remanding for a new trial on damages for the reasons stated above, we would have further reduced the awards (as reduced by the trial court) of $75,000 to each of decedent's two children, who were aged 19 and 20 at the time of his death. First, we reject defendant's contention that because the Estates, Powers and Trust Law, §1-2.9-a, reduced the age of majority from 21 to 18 years, the children were not entitled to recover anything. As noted in the New York Pattern Jury Instructions-Civil (PJI 2:320, 1990 Cumulative Supplement, Comment, p. 493) statutory authority continues to make parents responsible for their children's support to age 21 (Family Court Act, §413[1][a]; Domestic Relations Law, §32[3]). The law in New Jersey, where the children were domiciled, is not necessarily to the contrary (*see, Newburgh v. Arrigo*, 88 NJ 529, 443 A2d 1031, 1037-1038).

Nevertheless, there was insufficient evidence to support a $75,000 award for nurture and care prior to age 21 of Gilda Morejon, who was six months short of her 21st birthday, and Sergio Escobar, Jr., who was one year and six months short of his 21st birthday at the time of decedent's death. (*See, Red Star Towing and Transp. Co. v. "Ming Giant"*, 552 F Supp 367, 377-378 [SDNY 1982]; *De Centeno v. Gulf Fleet Crews, Inc.* 798 F2d 138 [5th Cir. 1986]). *Gonzalez v. NY City Housing Auth.* (__NY2d__, No. 58 decided April 25, 1991, [1991 N.Y. LEXIS 618]), cited by the plaintiff, does not call for a contrary result. In *Gonzalez* there was considerable evidence of the nature and pecuniary value of the services rendered by decedent to her grandchildren at the time of her death, whereas in the instant case the evidence centered upon decedent's nurture and care of his children when they were very young, in Cuba and Spain.

We find that the trial court erred in refusing to permit cross examination of Dr. Mantell about the present value of the loss of decedent's future earnings. If there is a retrial on the issue of damages, (i.e. if the parties cannot reach a reasonable settlement of this unconscionably long lawsuit), the ascertained future income and benefits that decedent would have received must be discounted to present value in making up the award, and since the lump-sum damages award is tax-free, the relevant stream of income that the damages award replaces should be calculated as after-tax wages and benefits (*Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 533-537). Social Security taxes shall also be deducted in computing future earnings, since the plaintiff should not be permitted to recover Social Security benefits the decedent would have received without taking into account the cost of those benefits (*Tallentire v. Offshore Logistics*, 754 F2d 1274, 1287, rev'd on other gds. 477 US 207, on remand, 800 F2d 1390, 1392).

With respect to the trial court's award of prejudgment interest, we agree that where the situs of the injury is on a vessel in navigable waters, whether the vessel is docked or under way, maritime law applies, and that in maritime cases the award of prejudgment interest is the rule, rather than the exception (*Helaire v. Mobil Oil Co.*, 709 F2d 1031, 1042-43 [5th Cir. 1983]; *Webster v. M/V Moolchand*, 730 F2d 1035, 1040 [5th Cir. 1984]; *Barnett v. Sea Land Service*, 875 F2d 741, 746-747 [9th Cir. 1989]; *Taliercio v. Compania Empressa L.a.*, 761 F2d 126, 129 [2d Cir. 1985]; *see, generally*, Anno: Award of Prejudgment Interest in Admiralty Suits, 34 ALR Fed. 126).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: August 22, 1991

Francis X. Galdi

Clerk